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Twenty-seventh session

SUMMARY RECORD OF THE 535th MEETING

Held at Headquarters, New York,
on Thursday, 9 June 1994, at 3 p.m.

Chairman: Mr. MORAN (Spain)

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The meeting was called to order at 3.10 p.m.

ELECTION OF OFFICERS (continued)

1. The CHAIRMAN announced that Mr. Choukri Sbai (Morocco), Mr. Abascal Zamora (Mexico) and Mr. Glatz (Hungary) had been elected Vice-Chairmen of the Commission, representing the African, Latin American and Eastern European States respectively.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/392; A/CN.9/XXVII/CRP.2 and Add.1-3)

UNCITRAL Model Law on Procurement of Goods and Construction and Guide to Enactment of that Law (continued)

Procurement of services (continued)

2. The CHAIRMAN submitted to the Commission for adoption the text of the UNCITRAL Model Law on Procurement of Goods, Construction and Services as amended by the drafting group on the basis of suggestions put forward during the deliberations (A/CN.9/XXVII/CRP.2 and Add.1-3).

A/CN.9/XXVII/CRP.2

Preamble and chapter I

3. The CHAIRMAN explained that the text of the preamble and articles 1 to 5, 7 to 13 and 15 as contained in document A/CN.9/392 had not been amended. Article 6 contained some changes and articles 11 bis and 11 ter would be renumbered once the Commission had adopted the text in full. Article 14 had been slightly modified in order to bring it into conformity with what the scope of the Model Law would be after procurement of services was incorporated.

4. Mr. CHATURVEDI (India) noted that the reference to subparagraph (f) of article 41 ter had been omitted from article 7, paragraph 3 (b) (ii).

5. Mr. LEVY (Canada) recalled that the Commission had agreed that the question was not one of substance but rather of editing, as the same text was contained in subparagraph (a) (iii) of that same paragraph.

6. Mr. WALLACE (United States of America) observed that, according to the draft report, the question had been referred to the drafting group.

7. Mr. CHATURVEDI (India) insisted that there had been no reason to delete that text.

8. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the preamble and chapter I.

9. It was so decided.

Chapter II

10. Mr. GRIFFITH (Observer for Australia) said that, in his view, the footnote which had been added following the consideration of article 16 appeared to undermine the principle that the text which now covered services should in no way affect the application of the original text on procurement of goods and construction. It might even dissuade States from adopting the whole menu of options available for the procurement of services. As a compromise solution, he suggested deleting the first two sentences of the footnote and simply stating: "States may choose not to incorporate all of those methods into their national legislation". A reference should then be made to the relevant paragraphs of the Guide to Enactment. He hoped that a special paragraph would be added to the Guide on procurement of goods and construction, indicating that chapter III bis could also be used in the case of services.

11. Ms. VERRALL (United Kingdom) expressed support for including a footnote on article 16 in order to stress that States were not obligated to promulgate the whole menu. In no case should the text already adopted be affected or amended. Any remaining doubts should be dispelled by deleting the first two sentences and perhaps even the entire footnote. If that was done, perhaps a simple, direct footnote could be included, referring promulgating States to those paragraphs of the Guide which dealt with the question in greater detail.

12. Mr. WALLACE (United States of America) said that it would be a shame to delete the footnote, which was the fruit of painstaking deliberations. If the text of the Model Law was moved to the Guide, the Commission would never see the final text, which was not a satisfactory method. He therefore requested that, at least on that question, the Commission should have before it those paragraphs of the Guide which contained the text that had been deleted from the cover page of the Model Law.

13. Mr. LEVY (Canada) said that he had suggested including the footnote in order to clarify a question of concern to a number of delegations. From the outset, Canada had pointed out that the text of the Model Law offered a wide range of options and that States were not obligated to incorporate all of them. In any case, the footnote was not part of the Law and so had no legal value. He therefore agreed to its deletion, despite the fact that it provided a useful explanation for the parties, who would surely not read the Guide immediately. If the footnote was included, he would wish to retain the last two sentences of the current footnote and add: "States may choose not to incorporate all of those methods into their national legislation. On this question, see paragraphs __ to __ of the Guide to Enactment".

14. Mr. CHATURVEDI (India) said he felt that a footnote should simply convey the idea, which had been accepted by the Commission, that States were not obligated to incorporate all the methods of procurement set out in the Model Law into their national legislation. The last sentence of the footnote on the cover page of document A/CN.9/XXVII/CRP.2/Add.3 would also have to be deleted, for no reference whatsoever should be made to the Guide to Enactment, which was a separate document.

15. Mr. TUVAYANOND (Thailand) said that the footnote agreed to by the Commission should be retained in order to suggest to Governments that they did not need to incorporate all methods of procurement into their national legislation. Each State should choose those methods best suited to its specific situation. If the wording could be changed to reflect that, there would be no problem in leaving the text as it was.

16. Mr. LOBSIGER (Observer for Switzerland) expressed a preference for retaining the footnote, whose formulation by the drafting group was adequate. It would also be useful to the reader of the text.

17. Mr. MELAIN (France) said that he was in favour of retaining the footnote, if only for purposes of information, and that it should explain why States were given the option of not incorporating all methods of procurement, rather than simply referring to the Guide. He suggested deleting the first two sentences and retaining the last two so that it would be clear that States could choose not to incorporate all methods.

18. Mr. WALLACE (United States of America) agreed with the representative of France that the penultimate sentence of the footnote should state exactly why States were being advised that they could choose not to incorporate all methods of procurement in their national legislation.

19. Mr. TUVAYANOND (Thailand) said that the footnote should be retained so that the text of the Model Law itself would include a clear reference to the Commission's intention. It was not sufficient to refer to the Guide, which was a separate document and might not be accessible to everyone who read the Model Law.

20. Mr. GRIFFITH (Observer for Australia) agreed with the representative of Thailand, adding that, during the current session, the Commission ought to consider the part of the Guide that dealt with the question under discussion.

21. The CHAIRMAN said that the secretariat would make every effort to circulate the relevant portion of the Guide in the days that followed.

22. Mr. CHATURVEDI (India) said that a reference to the Guide should not be included since the Commission had not reviewed it.

23. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to retain the reference to the Guide, provided that the text of the relevant part of that document was distributed before the end of the current session.

24. It was so decided.

25. The CHAIRMAN said that articles 17 to 20, which had been expanded to include services, presented no great problems. The same was true of chapter III, "Tendering proceedings" (arts. 21 to 35), and chapter IV, "Procedures for procurement methods other than tendering" (arts. 36 to 41), although those paragraphs might have to be renumbered when the Commission took up the inclusion of the additional chapter it had already agreed on. If he

heard no objection, he would take it that the Commission wished to adopt the first report of the drafting group (A/CN.9/XXVII/CRP.2).

26. It was so decided.

A/CN.9/XXVII/CRP.2/Add.1

27. Mr. TUVAYANOND (Thailand) said that, without prejudice to the adoption of the report contained in document A/CN.9/XXVII/CRP.2, the title of the Model Law, which referred to "procurement of goods, construction and services", should perhaps be changed as there was already an almost identical model law on procurement of goods and construction, which might give rise to the belief that a State could incorporate the latter into its national legislation without taking the former into account. He suggested that the draft Model Law before the Commission should be limited to the procurement of services, which would make it clear that the first model law applied to the procurement of goods and construction. That procedure was similar to the one adopted with respect to the law of treaties, in which treaties between States and treaties between international organizations or between international organizations and States were dealt with in separate conventions. There, too, the texts were very similar, although not identical.

28. Mr. WALLACE (United States of America) said that that suggestion might be taken up in the text of the footnote and pointed out that the adoption of document A/CN.9/XXVII/CRP.2 did not mean that the title of chapter IV had also been adopted.

29. The CHAIRMAN agreed with the representative of the United States of America that the new title of chapter IV should be considered separately.

30. Mr. GOH (Singapore), supported by Mr. LEVY (Canada), said that in order to avoid the possible confusion pointed out by the representative of Thailand, reference should be made to the year of adoption of the Model Law. Its title would then become "UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994".

31. Mr. HERRMANN (Secretary of the Commission) pointed out that if the year of adoption was included in the title of the Model Law it might be thought that it replaced the UNCITRAL Model Law on Procurement of Goods and Construction of 1993.

32. Mr. GOH (Singapore) suggested that reference should be made to the year of adoption; in order to solve the problem raised by the Secretary, it should be explained in the footnote on the first page of document A/CN.9/XXVII/CRP.2/Add.1 that the new Model Law did not replace the Model Law of 1993.

33. Mr. CHATURVEDI (India) said that the Secretary of the Commission was right. In any case, however, whenever the Model Law was referred to, the year of its adoption would be included, whether or not it appeared in the title. He proposed that a new sentence should be added before the last sentence of the footnote, to read: "The Model Law on Procurement of Goods, Construction and Services of 1994 does not amend that of 1993." He also wondered whether the

note should not read "adopted by the General Assembly" rather than "adopted by the Commission".

34. Mr. LEVY (Canada) agreed with the representative of India with respect to the title but suggested that the last part of the proposed sentence should read "but is not intended to supersede it".

35. Mr. HERRMANN (Secretary of the Commission) said that the footnote should not refer to adoption of the Model Law by the General Assembly, as the Assembly did not usually adopt texts prepared by the Commission but simply congratulated it on completing its preparation of a text and, in the case of a draft convention, recommended that a plenipotentiary conference should be convened to sign it or, in the case of a model law, recommended its adoption by Member States.

36. Mr. WALLACE (United States of America) said that it would be better to delete the words "which has now been expanded to include procurement of services" in the second sentence of the footnote and add a new sentence reading "This Model Law on Procurement of ... adds provisions on the procurement of services." That wording would also avoid the problem raised by the Secretary of the Commission.

37. Mr. LEVY (Canada) said it should be explicitly stated in the footnote that the new Model Law did not replace that of 1993.

38. Mr. CHATURVEDI (India) said that he could accept either the United States or the Canadian proposal provided that the phrase "but does not amend the UNCITRAL Model Law on Procurement of Goods and Construction for those States which wish to adopt it" was added to either wording.

39. Mr. AL-NASSER (Saudi Arabia) proposed that the title should read "Model Law adopted by UNCITRAL after inclusion of the procurement of services in the UNCITRAL Model Law on Procurement of Goods and Construction pursuant to a decision taken by the Commission at its twenty-sixth session."

40. The CHAIRMAN said that if he heard no objections he would take it that the Commission wished to refer the drafting of the footnote to the drafting group.

41. It was so decided.

Article 11 (i) ter

42. The CHAIRMAN said that if he heard no objections he would take it that the Commission wished to adopt article 11 (i) ter.

43. It was so decided.

Chapter III bis, article 41 bis

44. Mr. WALLACE (United States of America), referring to paragraph 3 of article 41 bis, said that it would be useful to explain briefly in the Guide what was meant by direct solicitation, as the Commission had not considered that

question. Moreover, the article did not specify that suppliers or contractors were to be excluded when the method of direct solicitation or notice was used or what the procuring entity should do if the services were offered by suppliers or contractors which had been informed of the solicitation or notice but had not responded to it. It might be useful for the Guide to include some direction for that case.

45. Mr. SHI Zhaoyu (China) said that the title of chapter III bis still did not state clearly the purpose of the articles contained in it, as it suggested that there was one standard method of procurement and that another special method was adopted when the first could not be applied, instead of making it clear that the method indicated in the chapter was to be given preference.

46. Mr. CHATURVEDI (India) agreed that the Guide should explain what was meant by "direct solicitation of proposals".

47. Mr. TUVAYANOND (Thailand) said that it appeared from the title that chapter III bis referred to a special method for procurement of services which was used only in special circumstances while the usual method would be tendering.

Article 41 ter

48. Mr. WALLACE (United States of America) said that article 41 ter, subparagraph (1), only referred to article 41 sexies, paragraph 1 (a), whereas it ought to say whether the method chosen was that of the lowest price, set out in article 41 sexies bis, paragraph 2 (a), or that of the best proposal in terms of criteria other than price, set out in article 41 sexies bis, paragraph 2 (b).

Article 41 quater

49. Mr. CHATURVEDI (India) proposed that the words "of local people" should be added after the words "the development of managerial, scientific and operational skills" in paragraph 1 (d).

50. Mr. LEVY (Canada) said that the word "local" was confusing as it was unclear whether it referred to a city, a county, a state or a country.

51. Mr. CHATURVEDI (India) said that if the expression "local people" posed a problem, the expression "local experts" could be used.

52. The CHAIRMAN pointed out that it was not for the Commission to introduce substantive changes to the Model Law. If he heard no objections, he would take it that the Commission wished to adopt the second report of the drafting group (A/CN.9/XXVII/CRP.2/Add.1).

53. It was so decided.

A/CN.9/XXVII/CRP.2/Add.2

Article 41 sexies

54. Mr. CHATURVEDI (India) said that in paragraph (3) the word "external" had been added before the word "experts"; that constituted a modification of the text initially approved.

55. The CHAIRMAN explained that the drafting group had agreed to include the word "external" to solve the problems that the text posed for the World Bank.

56. Mr. WALLACE (United States of America) said that, for the World Bank, the independence of the experts had to do with the contracting process, not with whether they were citizens of another country. The drafting group should bear that in mind.

Article 41 sexies ter

57. Mr. WALLACE (United States of America) noted that it was stated in the fourth line of paragraph 1 that the proposals had to be "acceptable"; he did not recall the Commission having agreed to that term. Other articles contained references to a "minimum level", an expression which seemed much more useful.

58. Mr. LEVY (Canada) said he had proposed the word "acceptable" thinking that it had more positive connotations than the expression "which have not been rejected". Also, the expression "minimum level" referred to the proposals, not to those who formulated them. Even if a proposal attained a given level, it was possible to have no confidence in the person who had made it.

59. Mr. WALLACE (United States of America) said that, according to article 41 sexies bis, paragraph 1, the procuring entity would establish a minimum level with respect to quality and technical aspects. According to article 41 sexies quater, subparagraph (a), the procuring entity would establish a minimum level in accordance with article 41 sexies bis, paragraph 1. In other words, the minimum level referred to quality and technical aspects. Therefore, if that concept was valid for article 41 sexies bis, it would also be valid for article 41 sexies quater and article 41 sexies ter. If that expression was used in all those articles, the text would be coherent.

The meeting was suspended at 5.10 p.m. and resumed at 5.40 p.m.

60. The CHAIRMAN, referring to the problem which had arisen because of the replacement in the text prepared by the drafting group of the term "threshold" by the expression "minimum level", said that some delegations had thought that the level to be fixed would be too low. He did not share that view, since in his opinion the minimum level would be established by the procuring entity. The problem had been resolved to a certain extent by the provision establishing the conditions to be met by proposals submitted to the procuring entity.

61. Mr. GRIFFITH (Observer for Australia), supported by Mr. CHATURVEDI (India), pointed out that if there were currently difficulties in reconciling different positions, it would be best to leave the text as it was.

62. Mr. WALLACE (United States of America) said that, although he could accept Australia's suggestion, he had been referring to article 41 sexies ter, paragraph 1, which meant that the question was a substantive one. He suggested getting around the problem by rewording the paragraph to which he had referred to read "The procuring entity shall engage in negotiations with suppliers or contractors that have submitted proposals which attain a minimum level with respect to quality and technical aspects."

63. Mr. LEVY (Canada) said that the wording proposed by the representative of the United States of America entailed a substantive question, since the threshold concept was being introduced into a provision in which it had not been present. If there was any disagreement, it would be best to keep to the text contained in document A/CN.9/XXVII/CRP.2/Add.2, which was the one prepared by the drafting group.

64. Mr. CHATURVEDI (India) supported the suggestion made by the representative of the United States of America, which he considered logical since article 41 sexies bis, paragraph 1, already contained the expression "minimum level".

65. Mr. GOH (Singapore) also supported the United States proposal and recalled that, originally, the concept of a threshold with respect to quality and technical aspects had been used in article 41 sexies.

66. Mr. BONELL (Italy) also thought that the question was a substantive one. The history of article 41 sexies ter, paragraph 1, indicated that the draft had originally referred to proposals which had not been rejected. That situation was different from the one in article 41 sexies bis and sexies quater, which expressly recognized that a minimum level must be established. That was why it was subsequently stated that, having chosen the procedure, the procuring entity must establish that minimum level, but that did not appear in article 41 sexies ter. Thus, if the present wording was changed, it would be necessary to restructure the whole paragraph and make it consistent with the other procedure.

67. Mr. TUVAYANOND (Thailand) said the text should refer to the proposals which had not been rejected, since it would be meaningless to open negotiations on proposals which had already been rejected.

68. The CHAIRMAN suggested retaining the original text of document A/CN.9/XXVII/CRP.2/Add.2 and including an article entitling the procuring entity to determine the characteristics of the proposals that merited consideration.

69. Mr. WALLACE (United States of America) said that the choice between referring to a minimum level and referring to acceptable proposals or to those which had not been rejected was a substantive question which his delegation had been right to bring up. He also pointed out that the word "threshold", which had been used initially, stated the concept they were trying to express more precisely.

The meeting rose at 6.05 p.m.